ANWAR v. PUBLIC PROSECUTOR

[A.Cr.J. (Wee Chong Jin C.J.) October 14, 1964]

[Singapore — Magistrate's Appeal No. 189 of 1964]

Criminal Procedure — Sentence — Caning — Imposition of — Circumstances of time and place to be considered.

The facts in this case were that during the second of the recent disturbances in Singapore on a day when the curfew was on the appellant with six or seven others were at Alexandra Road or off it. On being arrested after a chase and searched a knuckle duster was found in his possession. He was sentenced to one year's imprisonment and four strokes of the rotan. On appeal as to sentence,

Held: (1) the sentence of one year's imprisonment erred on the side of being excessive and in the circumstances should be reduced to one of three months;

(2) the court will normally not impose a sentence of caning unless violence has been used; but this was not a case where the court should take into consideration whether or not violence was in fact used; the circumstances of the time and place must be considered and as it was not the first of such disturbances but the second when the ordinary public in the State was subject to or witnessed such violence; taking that fact into consideration, the sentence of caning in this case was a perfectly proper one.

MAGISTRATE'S CRIMINAL APPEAL.

J. B. Jeyaretnam for the appellant.

Francis T. Seow (Senior Crown Counsel) for the Public Prosecutor.

Wee Chong Jin C.J.: This is probably the first case that has come up to this court with regard to the question of sentences in respect of persons who have committed offences during the period of the two disturbances we had in Singapore this year.

This offence was committed in September this year which was the second unfortunate episode we had here.

The facts were that during this episode on a day when the curfew was on the appellant with six or seven other male persons were at Alexandra Road or off it and on being arrested after a chase and search a knuckle duster was found in his possession. I cannot treat this as a case where the appellant was, so it is submitted, under stress and emotion during that particular period, and had thereby armed himself with an offensive weapon purely for the purpose of self defence. There was no question at that time of his having to be armed or have something in his possession which he could use as a weapon of defence during that period. There were no extenuating circumstances in that before that he might have met some trouble or was ever in a position where he had to defend himself because of the high feelings engendered during that period. That being so, possession of an offensive weapon during those unfortunate times must and can only be looked at as a very serious matter.

The question I have to decide now is whether the sentence of one year's imprisonment and four strokes of the rotan is a proper sentence and not manifestly excessive in those circumstances.

As regards the sentence of one year's imprisonment I am inclined to the view that it perhaps erred on the side of being excessive and I will accordingly reduce it to one of three months' imprisonment.

With regard to the sentence of caning although I accept that the court will normally not impose a sentence of caning unless violence has been used, I do not think this is a case where the court should take into consideration whether or not violence was in fact used. The circumstances of the time and place must be considered and we all know that this was not the first of such disturbances but the second when the ordinary public in this State was subject to or witnessed such violence as I hope we will never see again. Taking, as I must take, that fact into consideration, the sentence of caning in this case in my opinion is a perfectly proper one and that sentence must remain. I will accordingly allow the appeal only to the extent that the prison sentence is reduced to one of three months.

Prison sentence reduced; sentence of caning confirmed.

Solicitors: *David Marshall.*

YEGAPPAN v. DISTRICT COUNCIL CENTRAL, PROVINCE WELLESLEY (No. 2)

[O.C.J. (Hepworth J.) October 16, 1964]

[Penang — Originating Motion No. 6 of 1964]

Administrative law — Certiorari — Excess of jurisdiction — Acts of District Council whether administrative or judicial.

Municipal Ordinance, (Cap. 133), ss. 143 and 144A — Building By-Laws — Non compliance with Ordinance and Bye-Laws.

This was a motion for an order of *certiorari* to remove to the court and quash a decision of the District Council Central, Province Wellesley, approving the site plan and building plans constituting a housing scheme in Penang. The applicant was the owner of a bungalow and land adjacent to the land to be affected by the housing scheme. A preliminary point was raised and argued that on the facts of the case *certiorari* did not lie on the ground that the acts of the council were administrative and that in any event the evidence did not disclose that the council had acted in excess of jurisdiction. It was further argued that the council did not act in excess of its jurisdiction but what it had done was to misconstrue the bye-laws and had wrongfully exercised its jurisdiction.

Held: (1) as the applicant in this case was given a hearing for the purpose of considering what his submissions and objections were and the decision was arrived at after hearing him, the discretion which was exercised

by the district council was a judicial discretion and therefore *certiorari* lay to quash it;

(2) the approval of the plan in this case in breach of the bye-laws and without carrying out the procedure laid down in the Municipal Ordinance constituted an act in excess of the council's jurisdiction;

(3) the court will exercise its discretion in this case in favour of the applicant, as the development of the land adjacent to the applicant's land otherwise than in accordance with the Ordinance and the by-laws will affect the land and its value, and there was no evidence to show that more damage will be done by granting the application than by refusing it.

Cases referred to:—

(1) *R.* v. *Bradford-on-Avon U.D.C. & Others, Ex parte Bolton* [1964] 2 All E.R. 492.

(2) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.

(3) *In re an application by Loke Wan Tho* [1956] M.L.J. 149.

(4) *R.* v. *Hendon Rural District Council* [1933] 2 K.B. 696; [1933] All E.R. Rep. 20.

ORIGINATING MOTION.

Ong Huck Lim, N. Sharma and *R. K. Sharma* for the applicant.

Ng Ek Teong and *Lim Ewe Hock* for respondents.

Eusoffe Abdoolcader and *Tan Lye Huat* for the developers.

Cur. Adv. Vult.

Hepworth J.: This is a motion for an order of *certiorari* to remove into this court and to quash a decision of the District Council Central, Province Wellesley, approving the site plan and building plans constituting a housing scheme on Lots 14 and 15, Mukim 8, Province Wellesley Central, in the State of Penang. The applicant is the owner and occupier of a bungalow and land situated immediately adjacent to Lots 14 and 15.

A preliminary point was raised and argued that on the facts of this case *certiorari* does not lie on the ground that the acts of the council were administrative, but that, in any event, even if they were not, the evidence did not disclose that the council had acted in excess of its jurisdiction. As this is a matter of some urgency I disposed of this point by delivering an oral judgment immediately after the conclusion of the arguments of counsel for all parties. In this oral judgment I stated as follows:—

"The first question that has to be decided is the status of the applicant and I refer to *Dr. de Smith's* Judicial Review of Administrative Action at page 313 and what he says is this:—

> 'The position may be summarised thus: in strict law any member of the public may apply for *certiorari* to quash an order; in practice no application is likely to succeed except one made by a person aggrieved; the meaning of a person aggrieved is, for this purpose, much wider than in most other branches of the law; but an applicant's personal interest in the subject-matter of an impugned order may be too slight or too remote for him to be treated as a person aggrieved by it'

Now we know on the facts of this case that the applicant is the owner of a piece of land immediately adjacent to the piece of land which is being developed and which is the subject-matter of this application. The applicant is not only the owner of that piece of land but he is also the occupier of the house which has been erected on that piece of land. In this connection I think the observations of Widgery J. in *R.* v. *Bradford-on-Avon U.D.C. and Others, Ex parte Bolton* (1) are of interest. What the learned judge says at page 494 is this:—

> 'The applicant in his notice describes himself as a user of the highway who has suffered inconvenience and has been placed in danger since August, 1963, by virtue of the planning permission to which I have referred, that is to say, the detailed approval of May 7th, 1963. It is obviously open to question, to say the least of it, whether someone who describes himself as the applicant there describes himself, really has status to move for *certiorari* in a case of this kind at all. The matter is not entirely free of authority, and we have been referred to the decision in *R.* v. *Hendon Rural District Council, Ex parte Chorley* ([1933] All E.R. Rep. 20; [1933] 2 K.B., 696). That was a case in which *certiorari* was granted at the suit of the owner of land adjacent to land which was liable to be affected by a decision of what today we would call a local planning authority It is to be noted that the applicant in that case was not merely a member of the public living in the locality, but he was the owner of land which was likely to be affected by the decision itself, and it is, perhaps, not altogether surprising that in that case there was held to be sufficient status to apply for *certiorari*.'

It seems to me that the applicant is entitled as the owner and occupier of the land adjacent to the land which it is proposed to develop to expect that the development will be in compliance with the relevant by-laws and sections of the Municipal Ordinance. That being the case it seems to me that the applicant has got status.

Dr. de Smith at page 274 under the heading 'Acts in respect of which *Certiorari* and Prohibition may Issue' says:—

'In *R.* v. *Electricity Commissioner* (2) Atkin L.J. said that *certiorari* and prohibition may issue

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially,

act in excess of their legal authority. This proposition has been approved in many subsequent cases, and the present law can best be stated by analysing its implications.'

Dr. de Smith goes on to divide the statement of Lord Justice Atkin into four parts:—

(1) Any body of persons.

(2) Having legal authority.

(3) To determine questions affecting the rights of subjects.

(4) Having the duty to act judicially.

As regards the first part, 'Any body of persons' he has this to say:—

> 'The orders will issue against inferior courts, against administrative tribunals, against local authorities and other statutory bodies, and also against individual officers discharging functions of a judicial character. They will issue against departments of

State and individual Ministers, but it is generally assumed that they will not lie against the Crown because the orders are commands of the court, disobedience to which is a contempt punishable by attachment.'

Under the second heading, 'Having legal authority', I do not think that there is any doubt or any argument that a decision involving the passing of the plans by the council as in this case is an act which is authorised under the Municipal Ordinance and that the act complained of in this case was purported to be done under a right or power which is given to the council under the Municipal Ordinance. So I do not think that we have any difficulty over that part.

Then we go on to the third part which is 'To determine questions affecting the rights of subjects' and Dr. de Smith says at page 279 under paragraph (b):—

'(b) The "rights" affected may be rights to the enjoyment of personal liberty, to the pursuit of a profession or other calling, to the retention of unincumbered ownership and possession of property, to the carrying on of trade and the free negotiation of other contracts, to the receipt of compensation and social security benefits due under statute, to immunity from fines, rates and other fiscal burdens, and to relief from such burdens. This catalogue is by no means exhaustive; for, as we have already observed, in this context the term "rights" is to be understood in a very broad sense, and is not to be confined to the jurisprudential concept of rights to which correlative legal duties are annexed. It comprises an extensive range of legally recognised interests, the categories of which have never been closed.'

Then, again, at page 281 paragraph (e):—

'(e) In general, the rights affected must be those of individual legal persons, and not of the community as a whole or of an unincorporated group of persons. But the proposed appropriation of an area dedicated to the use of the public as an open space has been held to be a question affecting the rights of subjects. We must add that any member of the public may apply for an order of *certiorari* or prohibition to impugn a determination even though the question determined does not affect any interest of his own.'

Now applying that to this case it seems to me that the decision to approve the plans of the development of the neighbouring property does affect the ownership and possession of the applicant's land. In my opinion the evidence we have before us clearly shows that the ownership and possession of the applicant's land is affected by the development which it is intended should take place.

This brings us to the fourth part, which is the part which causes the most difficulty, that is whether there is a duty to act judicially. Under this heading I should first like to refer to the judgment of Whyatt C.J. in *In re An Application by Loke Wan Tho* [3] which is substantially relied upon by the respondents in this case. In the view that I take of the matter it is only of passing interest but as far as I can see it does not appear anywhere in that judgment what the statement by the applicant contained. However, I do not think that is important because in my view the paragraph that is of importance in that judgment in so far as we are concerned in the present case is the paragraph at page 150 which has reference to the case of *Rex* v. *Hendon Rural District Council* [4] and that paragraph reads as follows:—

'The case of *Rex* v. *Hendon Rural District Council, Ex parte Chorley,* much relied upon by the applicant is, in my view, not only clearly distinguishable but affords a useful and instructive illustration of a judicial or quasi-judicial act by a local government body. In that case an application for permission to build was made to the local council and, as Mr. Justice Humphreys expressed it in his judgment, "the council evidently thought that to do justice in this particular case the application ought to be advertised in the local paper, so that if persons had any objections to the scheme they might come forward and be heard". The application was duly advertised, although as the learned judge was careful to point out, there was no statutory obligation to do so and it was stated in the advertisement that any objections addressed to the council in writing would be considered by it. Objections were received and subsequently the application and the objections were all considered together by the council. "It seems to me impossible to say in this case", to quote the words of Mr. Justice Humphreys, "that the Hendon Rural District Council was not acting in a quasi-judicial manner in hearing and determining the application for permission to develop and the objections which were made to it". Nothing resembling this procedure was followed by the council in the present case; indeed the failure to publicise the project and invite objections formed the basis of a charge of dereliction of duty during the course of the debate on the 30th December, 1955. It is plain, therefore, that this decision has no application to the present case.'

So it is apparent that the facts of the *Loke Wan Tho* case, whatever the statement contained, bore no resemblance whatever to the facts of the *Hendon Rural District Council* case.

I think it would be helpful if we look at the *Hendon Rural District Council* case and see what Mr. Justice Humphreys said. This case is reported in [1933] 2 K.B. 696 and the relevant part of Mr. Justice Humphreys' judgment begins at page 705. This is what the learned judge says:—

'With regard to the difficult question whether the proceedings of this council on the occasion in question were proceedings in respect of which *certiorari* will lie, many observations are to be found in different cases by many learned judges who have endeavoured to express the particular circumstances in which a body, admittedly exercising, not the jurisdiction of a court, but a discretion of some sort or other, should be dealt with by this court by a writ of *certiorari.* The passage which my Lord has read from the judgment of Atkin L.J. in *Rex* v. *Electricity Commissioners* leaves unexplained to some extent the meaning of the words "to act judicially". Atkin L.J. said: "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling influence of the King's Bench Division". I think some assistance is to be obtained with regard to the meaning of the words "to act judicially" from the judgment of Fletcher Moulton L.J. in *Rex* v. *Woodhouse* ([1906] 2 K.B. 501, 535), where the learned Lord Justice said: "There must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

I think it is not uninteresting to see the view which the Hendon District Council took of the application which was made to it under the town-planning scheme. The council evidently thought that to do justice in this particular case the application ought to be advertised in the local paper, so that if persons had any objections to the scheme they might come forward and be heard. The result was that the council required that the applicant should advertise at his own expense, and should state in such advertisement that any objections addressed to the

council in writing would be considered by it, and, accordingly, objections were received to the granting of this order, among others, an objection from the applicant for the writ of *certiorari* in this case. The application and the objections were all considered together by the highways and plans committee, and then finally the matter came before the council.

It is quite true that the Act of Parliament under which the council was considering this application does not require that there should be any advertisement or notice of the application or an opportunity for objections being made, or that if made they should be considered, but it seems to me to be impossible to say in this case that the Hendon Rural District Council was not acting in a quasi-judicial manner in hearing and determining the application for permission to develop and the objections which were made to it.

I therefore agree that in this case it has been sufficiently shown that the discretion which was exercised by the members of the council was a judicial discretion. The issue of a writ of *certiorari* is therefore justified.'

Now let us see what actually happened in this case. I am now referring to the minutes of the housing committee meeting and the minutes of the full council meeting. This is what the minutes of the housing committee meeting say:—

'Proposals for 5 two-storey shophouses, 7 one-storey terrace house and 6 semi-detached one-storey houses on Lots 14 and 15, Mukim 8, Sungei Rambai.

The committee was informed that the owner of the land adjacent to the land for the proposed housing project, Y.B. Dr. M. P. L. Yegappan was invited to attend this meeting in order to get his opinion on this matter. Advice and comments of the State planning officer, senior health officer and senior executive engineer in respect of the plans of the sites and buildings were explained to Y.B. Dr. M. P. L. Yegappan and the committee.

After having heard the explanations Y.B. Dr. M. P. L. Yegappan made the following suggestions:—

(i) A 6 ft. high wall should be constructed to adjoin the rear wall of the semi-detached houses with the N.N.E. corner of shophouse No. 5. Another 6 ft. high wall should also be constructed in between the South East corner of shophouse No. 5 and the present fencing belonging to the owner of the land adjacent to it.

(2) The drains at the rear of the semi-detached houses which begin from the back portion of the houses should be amended to begin from the sides of the proposed houses.

(3) The rear doors of the proposed semi-detached houses should be closed up and new doors should be constructed on the sides of the semi-detached houses.

(4) The area fenced up by the proposed wall and the area behind the semi-detached houses belonging to Y.B. Dr. M. P. L. Yegappan should be cemented.

The following are his reasons:—

(i) To prevent the vacant space from being used.

(ii) To prevent rubbish from being thrown into that area.

The committee having considered the above-mentioned facts decided that it was not agreeable to the proposal put up by Y.B. Dr. M. P. L. Yegappan with the reason that the said wall would be an obstacle in case of fire and it decided to approve the plans of the sites and buildings as signed by the senior executive engineer and senior health officer in accordance with Building By-Law 20(i).

The meeting ended at 3.30 p.m.'

The meeting of the full council was held on the same day and the minutes read:—

'Proposal for the Construction of 5 two-storey shophouses, 7 one-storey terrace houses and 6 semi-detached two-storey houses on Lots 14 and 15, Mukim 8, Sungei Rambai.

The chairman informed that the purpose of having this special meeting was to discuss about the plans of the abovementioned housing projects which has been the subject-matter of the complaint lodged by Y.B. Dr. M. P. L. Yegappan.

The applicant has now forwarded the plans of the sites and new buildings and the said plans had already been sent as usual to the State planning officer, senior executive engineer and senior health officer. Those plans had been approved by them. The housing committee had also held a meeting with the purpose of discussing about the plans and the council is now waiting for the minutes of the housing committee.

The chairman then proposed that the council would adjourn this meeting for 15 minutes before the minutes of the special meeting of the housing committee could be ready for presentation to the council for its discussion and approval.

Inche Abu Bakar bin Din seconded this proposal. The meeting was adjourned and it continued at 4.20 p.m.

Inche Mohd. Yusoff proposed that this meeting would be conducted in a committee atmosphere for the discussion of this matter.

The proposed was seconded by Y.B. Inche Tan Cheng Bee and accepted unanimously.

The meeting was conducted in committee and the discussion on the matter was carried out.

The building inspector was invited to give an explanation in full detail in respect of the amended plans of the said project on the proposal of Y.B. Dr. M. P. L. Yegappan.

Inche Ooh Chooi Cheng asked as to under what authority was Y.B. Dr. M. P. L. Yegappan invited to the meeting of the housing committee.

Y.B. Inche Tan Cheng Bee explained that Y.B. Dr. M. P. L. Yegappan was only invited to be present at the special meeting of the housing committee for him to give his own explanation about the situation of the plans in respect of the whole project as advised by the Legal Adviser.

Inche Ooh Chooi Cheng stated that because Y.B. Dr. M. P. L. Yegappan was still requesting as what he had requested previously, and because he did not give any practical suggestion, Inche Ooh Chooi Cheng recommended that Y.B. Dr. M. P. L. Yegappan should be informed that the council was not agreeable to his explanation and that the council decided to approve the plans for the sites and buildings.

This decision should be given to him and he should be invited to forward any practical suggestion. His suggestions would be recommended to the planner at the time when the planner would begin to do the work of construction.

Y.B. Inche Tan Cheng Bee seconded the proposal of Inche Ooh Chooi Cheng and was unanimously agreed.

The chairman then proposed that the decision of the special meeting of the housing committee held on 9.12.63 and the decision of the meeting of the committee in council should be approved.

The proposal was seconded by Y.B. Inche Tan Cheng Bee and was agreed unanimously.

The meeting ended at 5.10 p.m.'

Now it is perfectly clear from those minutes, the minutes of the housing committee meeting and the minutes of the full council meeting, that the applicant in this case was given a hearing at the meeting of the housing committee and it seems to me that the applicant was given a hearing for the purpose of considering what his submissions and objections were, and a decision was arrived at after hearing him. In those circumstances I think that the events that took place at those meetings are similar in principle to the events that took place in the *Hendon Rural District Council* case. In this case apparently the respondents thought that to do justice to the applicant he should be given an opportunity of being heard and he was accordingly invited to attend and after hearing him the respondents reached their decision. As in the *Hendon Rural District Council* case the applicant's submissions and objections in this case were considered by the housing committee of the council and the matter subsequently came before the whole council. The present case is substantially on all fours with the *Hendon Rural District Council* case and accordingly in my opinion the discretion which was exercised by the respondents was a judicial discretion.

That leaves one further question and that is: Did the council act in excess of their jurisdiction which is the complaint which has been made in the statement? In my opinion on the facts that appear at the moment, and my attention has been drawn to the statement and certain parts of the affidavit in support, there is evidence that *prima facie* the acts of the respondents were *ultra vires* in that they did not comply with the by-laws and sections of the Municipal Ordinance and purported to permit the doing of acts contrary to the provisions of those by-laws and sections of the Ordinance and accordingly on the face of it the respondents acted in excess of their jurisdiction.

I therefore hold that *certiorari* does lie in this case."

Further submissions have been made that the council did not act in excess of its jurisdiction and I will deal with these after referring to the facts.

The applicant's statement setting out the reliefs sought alleges 8 breaches of the Municipal Ordinance (Chapter 133) and the Rural Board, Province Wellesley, Building By-Laws, 1950, made in exercise of the powers conferred by sections 58(1)(j) and (k) and 143 of the said Ordinance. This Ordinance and these By-Laws will be referred to hereafter as the Ordinance and the By-Laws. I shall now deal with each of the alleged breaches.

I do not consider that there has been any breach of by-law 17(1)(e), because in my opinion the drainage referred to therein is surface drainage and the by-law has been complied with with regard to surface drainage.

There has been no breach of the provisions of section 107 of the Ordinance and by-law 37(2) because at the relevant time there was no regular line of the street and no building line approved by the council. Any orders made with regard thereto had been withdrawn by the council in October, 1963. The applicant was not aware that the council's previous decision had been withdrawn.

Giving the respondents the benefit of the doubt I do not think there has been a contravention of section 146 of the Ordinance. This is the section which provides that every building which any person erects shall have directly attached thereto an open space exclusively belonging thereto, which open space shall, in the case of a domestic building, be not less than one half of the area covered by the buildings. Reference to Plan A-2 shows that Type A Buildings Nos. 1, 2 and 3 have in front a service road and Type A Building Nos. 4 and 5 have in front a service road and at the side a side-lane. If this service road and side-lane are excluded the open space exclusively belonging thereto is less than one half of the area covered by the buildings. There was, however, no evidence to show that the service road and the side-lane were not exclusively belonging to the buildings referred to.

Giving the respondents the benefit of the doubt there was not a breach of section 145 of the Ordinance and by-law 123. Reference to the Plan 2-A shows that the B Type Buildings have no back-lane as required under subsection (1) of section 145 of the Ordinance. However, subsection (2) of that section does give the council power to approve a plan notwithstanding that the conditions of subsection (1) have not been complied with in the circumstances stated in subsection (2), and, although there was no evidence one way or the other, I am assuming that the council dispensed with the necessity for a back-lane of the Type B Buildings under the powers contained in subsection (2), and as these buildings had a secondary means of access to the rear of the premises there was no contravention of by-law 123.

By-law 142 reads as follows:—

"142. For a detached house or a pair of semi-detached houses there shall be at least 10 feet clear between the building and the boundaries of its plot."

A brief glance at Plan A-2 shows that this by-law has not been complied with in respect of the Type A Buildings Nos. 4 and 5. There is no clear space whatever to the west of the buildings.

It has been argued on behalf of the applicant that eaves and aprons of a building form part of that building and that measurements of the building for the purpose of ascertaining, for example, the distance between the building and the boundaries of the plot should be made from the eaves or the aprons, whichever extends the

furthest, and not from the main walls. In my opinion the yardstick should be the achievement of the purpose for which the particular by-law was made. The appropriate part of the building in any case from which the measurements for the purposes of by-law 142 should be made will be a question of fact dependent on the facts of that case. On the facts of this case I think the measurement should be from the main walls.

By-law 17(1)(b) has not been complied with in that Plan A-2 shows the position of the nearest existing building but does not describe it other than giving its number. There is nothing to indicate on Plan A-2 what the building shown is. It is in fact the applicant's bungalow.

By-law 46 reads as follows:—

"46. The proportion borne by the depth to the frontage in the case of any domestic building not being a detached or semi-detached building shall not exceed the proportion of 2¼, depth, to 1, frontage; provided that in no case shall the depth exceed 45 feet and provided further that, subject to the provisions of section 146 of the Ordinance, such extensions of or additions to such building may be permitted as shall not, to the satisfaction of the board, exclude light or air therefrom."

Of the Type A Buildings Nos. 1, 2 and 3 shown on the Plan A-2, Nos. 1 and 3 measure 19 feet 10½ inches by 58 feet 6 inches and No. 2 19 feet 6 inches by 58 feet 6 inches. These buildings, therefore, do not comply with the provisions of by-law 46, their proportions being approximately 3, depth, to 1, frontage.

It is argued however that as the second proviso permits extensions of or additions to such building provided that the provisions of section 146 of the Ordinance as to open spaces are not contravened, such extensions of or additions to the building can as well be permitted at the time of the construction of the building as at some later date. It is argued that as the front part, the shop part, of these buildings is only 40 feet in depth this is less than 2¼ times a width of 19 feet 6 inches or 19 feet 10½ inches and as the whole of the building does not contravene the provisions of section 146 as to open spaces, the remainder of the building comprising the dining place, kitchen, lavatory, bathroom and store-rooms can be considered to be such extensions or additions as are envisaged in by-law 46.

In my opinion this proposition is wholly untenable. It is quite clear that when by-law 46 refers to a domestic building it refers to the whole of that building and not to a part of the building and that the person who drafted and passed this by-law intended it to apply to the whole building and not to a part of the building. The buildings in question are terrace houses shown in the building plans as comprising rooms referred to as shop, dining place, kitchen, bathroom, w.c. with three rooms upstairs and if this comes within the definition of a domestic building, as it does, then all the rooms referred to constitute that domestic building. Put in another way, the dining place, kitchen, bathroom and w.c. do not constitute extensions of or additions to the domestic building but are part and parcel of that building. By-law 46 has therefore been contravened.

Subsection (1) of section 144A of the Ordinance permits the council on receipt of an application in relation to any particular building or structure and provided that they are satisfied that such waiver or modification as thereinafter mentioned will not render the building or structure unsafe, modify or waive, upon and subject to such terms and conditions as they think fit, any of the requirements of any of the Building By-Laws. It is apparent, therefore, that the council could, if the developers had so applied, have modified or waived the requirements of the By-Laws the breaches of which I have referred to. No such application was made and no such modification or waiver was therefore permitted under section 144A. On such an application being made subsection (3)(a) of the section provides that if it appears to the council that the rights or interests of the owner of any premises adjoining the premises in respect of which the application is made would be affected by the modification or waiver desired by the applicant the council shall serve upon the owner of such adjoining premises notice of the application at least seven days before the date on which the application is to be considered stating therein the date of such consideration and informing him of his rights to make representations to the council thereon. And subsection (3)(b) provides that any owner of adjoining premises on whom notice of the application has been served as aforesaid may, before the date stated in the said notice as that on which such application is to be considered, make representations in writing to the council with respect to the application and the council shall have regard to any such representations at the same time as the application is considered. No such notice was, of course, served on the applicant.

It is argued that what the council has done is to misconstrue the By-Laws and that accordingly all that it has done is wrongfully to exercise its jurisdiction and has not acted in excess of its jurisdiction. It is submitted that where there is jurisdiction to entertain an application, that jurisdiction is not lost by coming to a wrong conclusion, whether it was wrong in law or in fact. It does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. has jurisdiction) to determine. It is submitted on the other hand that this is the

"pure" theory of jurisdiction and that there are other considerations which are relevant. It must not be assumed that when the legislature empowers an inferior tribunal to inquire into certain facts it intends that the tribunal's conclusions on every one of those facts shall be unimpeachable. The supervisory jurisdiction exercised by superior courts over inferior tribunals has been of particular constitutional importance in relation to administrative tribunals, and it could not have been effective except on the hypothesis that certain of the questions committed to an inferior tribunal demarcated the limits of its jurisdiction and that the decisions of the tribunal on those questions were reviewable otherwise than on appeal. The "pure" theory would have reduced jurisdictional control almost to vanishing point. (See *Dr. de Smith* at pages 66 *et seq*).

It is also argued that a practical construction put upon a doubtful or ambiguous statute by the officers of the executive department who are charged with its execution, if long acted upon and generally acquiesced in, is regarded as strong evidence of the true meaning of the law, and, although it is not binding upon the courts, they will not interpret the law differently, unless there are weighty reasons for so doing.

In my opinion it is not a question of the council having misconstrued the By-Laws or the Ordinance. In my opinion the natural and reasonable meaning of the relevant sections and By-Laws is abundantly clear. Nowhere in the respondents' affidavit do they allege that the meaning of any of the sections of the Ordinance or the By-Laws is doubtful or ambiguous. They have said that they are relying on practice, "it has been done before". The necessary ingredients to support the theory of executive construction are not present in this case.

The breaches of the By-Laws to which I have referred are breaches which, as I have already indicated, were or should have been clearly apparent to anyone having even a rudimentary working knowledge of the Ordinance and the By-Laws. On receipt of the site and building plans, therefore, the council should have returned them to the developers informing them of the respects in which they did not comply with the By-Laws and informing them that if they wished the council to modify or waive those breaches then they should make an application as indicated in section 144A for the consideration of the council. The council could then have followed the procedure indicated in section 144A and if they thought fit approved the proposed modification or waiver of those By-Laws, after having regard to the representations in writing of the owners of any adjoining premises. The approval of the plans containing the breaches of the By-Laws referred to without carrying out the procedure laid down in section 144A constitutes in my opinion an act or acts by the council in excess of its jurisdiction.

It has been argued that as *certiorari* is a discretionary remedy the court's discretion should be exercised in favour of the respondent on the ground that more damage would be done by granting the application than by refusing it, that the infringements of the By-Laws are minimal in character and that in any event the applicant has suffered no damage and will suffer no damage by the implementation of the decision of the council which is complained of.

I do not think more damage will be done by granting the application than by refusing it. Maybe the developers will have to modify their plans to comply with the provisions of the Ordinance and the By-Laws but as the infringements which have been proved only affect the Type A houses such modification does not appear to present an insuperable obstacle.

I do not think that there is any doubt that the development of the land in question immediately adjacent to the applicant's land otherwise than in compliance with the Ordinance and the By-Laws will affect that land and its value and in my opinion the applicant is entitled to insist that the provisions of the Ordinance and the By-Laws are strictly complied with.

There will be an order in terms of the motion. The applicant's costs to be taxed and paid by the respondents.

I will hear argument as to the costs of the developers.

Order in terms.

Solicitors: *Sharma & Co.; Lim Ewe Hock; Tan Lye Huat & Co.*

TAN BENG SIEW v. CHOO ENG CHOON

[F.C. (Wee Chong Jin C.J. (Singapore), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) October 19, 1964]

[Singapore — Federal Court Civil Appeal No. 93 of 1963]

Limitation Ordinance, 1959, ss. 9 & 18 — Adverse possession — Unequivocal conduct of trespasser.

Land — Long adverse possession — Title to.

The appellant the trustee of the estate of Tan Say Hin deceased claimed possession of a piece of land. The respondent resisted the claim and counterclaimed for a declaration that he was entitled to the piece of land by virtue of long adverse possession. He had gone into possession of the land without the permission of the owner and had fenced the land and barred all access to it by means of a fence around it and a locked gate and had continued to so possess it for twelve years and upwards on the facts,

Held: the true owner's right and title to the land was extinguished by virtue of the Limitation Ordinance.